

Appendix 4-R
Rule 32 + Rule 33
(No redlines)

Rule 32. Post-Conviction Relief for Defendants Sentenced Following a Trial or a Contested Probation Violation Hearing

Rule 32.1. Scope of Remedy

Generally. A defendant may file a notice requesting post-conviction relief under this rule if the defendant was convicted and sentenced for a criminal offense after a trial or a contested probation violation hearing, or in any case in which the defendant was sentenced to death.

No Filing Fee. There is no fee for filing a notice of post-conviction relief.

Grounds for Relief. Grounds for relief are:

- (a) the defendant's conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence as imposed is not authorized by law;
- (d) the defendant continues to be or will continue to be in custody after his or her sentence expired;
- (e) newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:
 - (1) the facts were discovered after the trial or sentencing;
 - (2) the defendant exercised due diligence in discovering these facts; and
 - (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence.
- (f) the failure to timely file a notice of appeal was not the defendant's fault;
- (g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence; or
- (h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the

defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would have imposed the death penalty.

COMMENT

Rule 32.1(a). This provision encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the United States or Arizona constitutions.

Rule 32.1(d). This provision is intended to include claims such as miscalculation of sentence or computation of sentence credits that result in the defendant remaining in custody when he or she should be free. It is not intended to include challenges to the conditions of imprisonment or correctional practices.

Rule 32.1(h). This claim is independent of a claim under Rule 32.1(e) concerning newly discovered evidence. A defendant who establishes a claim of newly discovered evidence need not comply with the requirements of Rule 32.1(h).

Rule 32.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 32.1(a) based on any ground:

- (1) still raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
- (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding; or
- (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded. Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3). However, when a defendant raises a claim that falls under Rule 32.1(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

Rule 32.3. Nature of a Post-Conviction Proceeding and Relation to Other Remedies

(a) Generally. A post-conviction proceeding is part of the original criminal action and is not a separate action. It displaces and incorporates all trial court post-trial remedies except those obtainable by Rule 24 motions and habeas corpus.

(b) Other Applications or Requests for Relief. If a court receives any type of application or request for relief—however titled—that challenges the validity of the defendant’s conviction or sentence following a trial, it must treat the application as a petition for post-conviction relief. If that court is not the court that convicted or sentenced the defendant, it must transfer the application or request for relief to the court where the defendant was convicted or sentenced.

(c) Defendant Sentenced to Death. A defendant sentenced to death in a capital case must proceed under Rule 32 rather than Rule 33 for all post-conviction issues, even if the defendant pled guilty to first-degree murder or other crimes.

COMMENT

This rule provides that all Rule 32 proceedings are to be treated as criminal actions. The characterization of the proceeding as criminal assures compensation for appointed counsel, and the applicability of criminal standards for admissibility of evidence at an evidentiary hearing, except as otherwise provided.

Rule 32 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals who are unlawfully committed, detained, confined, or restrained. But if a convicted defendant files a petition for a writ of habeas corpus (or an application with a different title) that seeks relief available under Rule 32, the petition or application will be treated as a petition for post-conviction relief.

This rule does not limit remedies that are available under Rule 24.

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

(a) Generally. A defendant starts a Rule 32 proceeding by filing a Notice Requesting Post-Conviction Relief.

(b) Notice Requesting Post-Conviction Relief.

- (1) *Where to File; Forms.*** A defendant must file a notice requesting post-conviction relief under Rule 32 in the court where the defendant was sentenced. The court must make “notice” forms available for defendants.

(2) ***Content of the Notice.*** The notice must contain the caption of the original criminal case or cases to which it pertains, and all information shown in Rule 41, Form 24(b).

(3) ***Time for Filing.***

(A) *Claims under Rule 32.1(a).* A defendant must file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later.

(B) *Claims under Rule 32.1(b) through (h).* A defendant must file the notice for a claim under Rule 32.1(b) through (h) within a reasonable time after discovering the basis of the claim.

(C) *Time for Filing a Notice in a Capital Case.* In a capital case, the Supreme Court clerk must expeditiously file a notice requesting post-conviction relief with the trial court upon the issuance of the mandate affirming the defendant's conviction and sentence on direct appeal.

(D) *Excusing an Untimely Notice.* The court must excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.

(4) ***Duty of the Clerk upon Receiving a Notice.***

(A) *Superior Court.* Upon receiving a notice, the superior court clerk must file the notice in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defendant's counsel, the prosecuting attorney's office, and the Attorney General. The clerk must note in the record the date and manner of sending copies of the notice.

(B) *Justice or Municipal Court.* If the conviction occurred in a limited jurisdiction court, upon receiving a notice from a defendant, the limited jurisdiction court clerk must send a copy of the notice to the prosecuting attorney who represented the State at trial, and to defendant's counsel or the defendant, if self-represented. The clerk must note in the record the date and manner of sending copies of the notice.

(C) *Notice to an Appellate Court.* If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court within 5 days of its

filing and must note in the record the date and manner of sending the copy.

- (5) ***Duty of the State upon Receiving a Notice.*** Upon receiving a copy of a notice, the State must notify any victim who has requested notification of post-conviction proceedings.

COMMENT TO RULE 32.4(a)

A Notice Requesting Post-Conviction Relief informs the trial court of a possible need to appoint an attorney for the defendant as provided in Rule 32.5. The Notice Requesting Post-Conviction Relief also assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

COMMENT TO RULE 32.4(b)(4)(C)

If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may suspend the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence. *See* Rule 31.4(b) (requiring consolidation unless good cause exists not to do so).

Rule 32.5. Appointment of Counsel

- (a) **Noncapital Cases.** No later than 15 days after the defendant has filed a timely first notice under Rule 32.4, the presiding judge must appoint counsel for the defendant if:

- (1) the defendant requests it;
- (2) the defendant is entitled to appointed counsel under Rule 6.1(b); and
- (3) there has been a previous determination that the defendant is indigent, or the defendant has completed a declaration of indigency and the court finds that the defendant is indigent.

Upon filing of all other Rule 32 notices, the presiding judge or the judge's designee may appoint counsel for an indigent defendant.

- (b) **Capital Cases.** After the Supreme Court has affirmed an indigent capital defendant's conviction and sentence, the Supreme Court or its designee must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. If the Supreme Court has authorized the presiding judge of the county where the case originated to appoint counsel, the presiding judge must file a copy of the appointment order with the Supreme Court. If a capital defendant files a successive notice, the presiding judge must appoint the defendant's previous post-

conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel.

(c) Appointment of Investigators, Expert Witnesses, and Mitigation Specialists. On application and if the trial court finds that such assistance is reasonably necessary for an indigent defendant, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7.

(d) Attorney-Client Privilege and Confidentiality for the Defendant. The defendant's prior counsel must share all files and other communications with post-conviction counsel. This sharing of information does not waive the attorney-client privilege or confidentiality claims.

Rule 32.6. Duty of Counsel; Self-Represented Defendant's Petition; Waiver of Attorney-Client Privilege

(a) Generally. In a Rule 32 proceeding, counsel must investigate the defendant's case for any colorable claims.

(b) Discovery.

(1) *After Filing a Notice.* After the filing of a notice but before the filing of a petition, and upon a showing of substantial need for material or information to prepare the defendant's case, the court may enter an order allowing discovery. To show substantial need, the defendant must demonstrate that the defendant cannot obtain the substantial equivalent by other means without undue hardship.

(2) *After Filing a Petition.* After the filing of a petition, the court may allow discovery for good cause. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim.

(c) Counsel's Notice of No Colorable Claims. If counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination, and promptly provide a copy of the notice to the defendant. The notice must include or list:

- (1)** a summary of the facts and procedural history of the case;
- (2)** the specific materials that counsel reviewed;

- (3) the date counsel provided the record to the defendant, and the contents of that record;
- (4) the dates counsel discussed the case with the defendant;
- (5) the charges and allegations presented in the complaint, information, or indictment.

In the notice, counsel should also identify the following:

- (6) any adverse pretrial rulings affecting the course of trial (e.g., motions to suppress, motions *in limine*, motions to quash, speedy trial motions);
 - (7) any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, mistrial motions, motions for directed verdict);
 - (8) any adverse rulings on post-trial motions (e.g., motion for a new trial, motion to vacate judgment);
 - (9) issues regarding jury selection, if the trial was to a jury;
 - (10) issues regarding jury instructions, if the trial was to a jury;
 - (11) any potential errors for which there were no objections, but which may rise to the level of fundamental error;
 - (12) any determination of the defendant's competency that was raised prior to sentencing;
 - (13) any objections raised at the time of sentencing;
 - (14) the court's determination of the classification and category of offenses for which the defendant was sentenced;
 - (15) the court's determination of pre-sentence incarceration credit;
 - (16) the sentence imposed by the court;
 - (17) issues raised by appellate counsel; and
 - (18) any potential claims of ineffective assistance of trial or appellate counsel.
- (d) **Self- Represented Defendants Petition.** Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for the defendant to file that petition by 45 days from the date counsel

filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

- (e) Counsel's Duties after Filing a Notice Under Section (c).** After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the post-conviction proceeding.
- (f) Attorney-Client Privilege.** By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim, as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

COMMENT TO RULE 32.6(b)

The standard in this rule for pre-petition discovery is derived from Rule 15.1(g).

COMMENT TO RULE 32.6(c)

Rule 32.6(c) is intended to assist counsel in reviewing the record to ensure that substantial justice is done. Counsel must take care that the Notice of No Colorable Claims does not reveal client confidences to the court without the client's informed consent. See Ariz. Rules Sup. Ct. 42, ER 1.6.

Rule 32.7. Petition for Post-Conviction Relief

(a) Deadlines for Filing a Petition for Post-Conviction Relief.

(1) *Noncapital Cases.*

- (A) *Generally.*** In every case except those in which the defendant was sentenced to death:
 - (i)** Appointed counsel must file a petition no later than 60 days after the date of appointment.
 - (ii)** A self-represented defendant must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.
- (B) *Time Extensions.*** For good cause and after considering the rights of the victim, the court may grant a defendant in a noncapital case a 30-day extension to file the petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.

(2) Capital Cases.

(A) Generally. In a capital case, the defendant must file a petition no later than 12 months after the first notice is filed.

(B) Filing Deadline for Any Successive Petition. On a successive notice in a capital case, the defendant must file the petition no later than 30 days after the notice is filed.

(C) Time Extensions. For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. After considering the rights of the victim, the court may grant additional extensions for good cause.

(b) Form of Petition. A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.

(c) Length of Petition.

(1) Non-Capital Cases. In noncapital cases, the petition must not exceed 28 pages.

(2) Capital Cases. In capital cases, the petition must not exceed 160 pages.

(d) Declaration. A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief.

(e) Attachments. The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.

(f) Effect of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

Rule 32.8. Transcript Preparation

- (a) Request for Transcripts.** If the verbal record of trial court proceedings was not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.
- (b) Order Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant has specified in the notice.
- (c) Deadlines.** The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.
- (d) Cost.** If the defendant is indigent, the transcripts must be prepared at county expense.
- (e) Unavailability of Transcripts.** If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 32.9. Response and Reply; Amendments

(a) State's Response.

- (1) *Deadlines.*** The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.
- (2) *Contents.*** The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

- (b) Defendant's Reply.** The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.

(c) Length of Response and Reply.

- (1) *Non-Capital Cases.*** In noncapital cases, the State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.

(2) **Capital Cases.** In capital cases, the State's response must not exceed 160 pages, and defendant's reply must not exceed 80 pages.

(d) **Amending the Petition.** After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 32.10. Assignment of a Judge

(a) **Generally.** The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. The provisions of Rules 10.1 and 10.2 apply in proceedings for post-conviction relief when the case is assigned to a new judge.

(b) **Dispute Regarding Public Records.** The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, that concerns access to public records requested for a post-conviction proceeding.

Rule 32.11. Court Review of the Petition, Response, and Reply; Further Proceedings

(a) **Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.

(b) **Setting a Hearing.** If the court does not summarily dismiss the petition, it must set a status conference or a hearing within 30 days.

(c) **Notice to Victim.** If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.

(d) **Defendant's Competence.** The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim.

Rule 32.12. Informal Conference

(a) **Generally.** At any time, the court may hold an informal conference to expedite a proceeding for post-conviction relief.

(b) **Capital Cases.** In a capital case, the court must hold an informal conference no later than 90 days after counsel is appointed on the first notice requesting post-conviction relief.

- (c) **The Defendant's Presence.** The defendant need not be present at an informal conference if defense counsel is present.

Rule 32.13. Evidentiary Hearing

- (a) **Generally.** The defendant is entitled to a hearing to determine issues of material fact and has the right to be present and to subpoena witnesses for the hearing. The court may order the hearing to be held at the defendant's place of confinement if facilities are available and after giving at least 15 days' notice to the officer in charge of the confinement facility. In superior court proceedings, the court must make a verbatim record.
- (b) **Evidence.** The Arizona Rules of Evidence applicable to criminal proceedings apply at the hearing, except that the defendant may be called to testify.
- (c) **Burden of Proof.** The defendant has the burden of proving factual allegations by a preponderance of the evidence. If the defendant proves a constitutional violation, the State has the burden of proving beyond a reasonable doubt that the violation was harmless.
- (d) **Decision.**
- (1) ***Findings and Conclusions.*** The court must make specific findings of fact and expressly state its conclusions of law relating to each issue presented.
 - (2) ***Decision in the Defendant's Favor.*** If the court finds in the defendant's favor, it must enter appropriate orders concerning:
 - (A) the conviction, sentence, or detention;
 - (B) any further proceedings, including a new trial and conditions of release; and
 - (C) other matters that may be necessary and proper.
- (e) **Transcript.** On a party's request, the court must order the preparation of a certified transcript of the evidentiary hearing. The request must be made within the time allowed for filing a petition for review. If the defendant is indigent, preparation of the evidentiary hearing transcript will be at county expense.

Rule 32.14. Motion for Rehearing

- (a) **Timing and Content.** No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

- (b) **Response and Reply.** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply no later than 10 days after the response is served.
- (c) **Stay.** The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court.
- (d) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 32.16.
- (e) **Disposition if Motion Granted.** If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing and then either amend or reaffirm its previous ruling. The court must state its reasons for amending a previous ruling. The State must notify the victim of any action taken by the court if the victim has requested notification.

Rule 32.15. Notification to the Appellate Court

If an appeal of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must file any final ruling in the appellate court within 10 days after the ruling is filed.

Rule 32.16. Petition and Cross-Petition for Review

(a) Time and Place for Filing.

- (1) ***Petition.*** No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, or the dismissal of a notice, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) ***Cross-Petition.*** The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.
- (3) ***Place for Filing.*** The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.
- (4) ***Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.***

(A) A party may seek an extension of time for filing the petition or cross-petition for review by filing a motion with the trial court, which must decide the motion promptly.

(B) If the time for filing the petition or cross-petition for review has expired, the party may request the trial court's permission to file a delayed petition or cross-petition for review. If the court grants the request to file a delayed petition or cross-petition for review, the court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or cross-petitioner must file with the trial court a "notice of filing." The notice of filing may designate additional items for the record described in section (j). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.13(e), or that were otherwise available to the trial court and the parties and are material to the issues raised in the petition or cross-petition for review.

(c) Form and Contents of a Petition or Cross-Petition for Review.

(1) ***Form and Length.*** Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings. However, a petition for review and a response to a petition for review in a capital case must not exceed 12,000 words if typed or 44 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

(2) ***Contents.*** A petition or cross-petition for review must contain:

(A) copies of the trial court's rulings entered under Rules 32.2, 32.11, 32.13, and 32.14;

(B) a statement of issues the trial court decided that the defendant is presenting for appellate review;

- (C) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
 - (D) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.
- (3) ***Effect of a Motion for Rehearing.*** The filing of a motion for rehearing under Rule 32.14 does not limit the issues a party may raise in a petition or cross-petition for review.
- (4) ***Waiver.*** A party's failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue.
- (d) **Appendix Accompanying a Petition or Cross-Petition.** Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.
- (e) **Service of a Petition for Review, Cross-Petition for Review, Reply, or Related Filing.** A party filing a petition, cross-petition, appendix, response, or reply, or another filing, must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with Rule 1.7(c)(3), identifying who was served and the date and manner of service.
- (f) **Response to a Petition or Cross-Petition for Review; Reply.**
- (1) ***Time and Place for Filing a Response; Extensions of Time.***
 - (A) No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate court. Rule 31.3(d) governs computation of the deadline for filing the response.
 - (B) A party may file a motion with the appellate court for an extension of the time to file a response or reply in accordance with Rule 31.3(e).
 - (2) ***Form and Length of Response.*** The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in subpart (c)(1). An appendix to a response must comply with the form and substantive requirements in section (d).

(3) **Reply.** No later than 10 days after a response is served, a party may file a reply. The reply is limited to matters addressed in the response and may not exceed 3,000 words if typed and 11 pages if handwritten. It also must comply with the requirements in subpart (c)(1) and may not include an appendix.

(g) **Computing and Modifying Appellate Court Deadlines.** Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule. An appellate court may modify any deadline in accordance with Rule 31.3(e).

(h) **Amicus Curiae.** Rules 31.13(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.

(i) **Stay Pending Appellate Review.** The State's filing of a petition for review of an order granting a new trial automatically stays the order until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court.

(j) **Transmitting the Record to the Appellate Court.** No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record to the appellate court. The record includes copies of the notice requesting post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responses, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).

(k) **Disposition.** The appellate court may grant review of the petition or cross-petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper.

(l) **Reconsideration or Review of an Appellate Court Decision.** The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).

(m) **Return of the Record.** After the disposition of the petition for review, the appellate clerk must return the record to the trial court clerk.

(n) **Notice to the Victim.** Upon the victim's request, the State must notify the victim of any action taken by the appellate court.

Rule 32.17. Post-Conviction Deoxyribonucleic Acid Testing

(a) Generally. Any person who has been convicted and sentenced for a felony offense may petition the court at any time for forensic deoxyribonucleic acid (DNA) testing of any evidence:

- (1) in the possession or control of the court or the State;
- (2) related to the investigation or prosecution that resulted in the judgment of conviction; and
- (3) that may contain biological evidence.

(b) Manner of Filing; Response. The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 32.4(b)(4). The State must respond to the petition no later than 45 days after it is served.

(c) Appointment of Counsel. The court may appoint counsel for an indigent defendant at any time during proceedings under this rule.

(d) Court Orders.

(1) ***DNA Testing.*** After considering the petition and the State's response, the court must order DNA testing if the court finds that:

(A) a reasonable probability exists that the defendant would not have been prosecuted, or the defendant's verdict or sentence would have been more favorable, if DNA testing would produce exculpatory evidence;

(B) the evidence is still in existence; and

(C) the evidence was not previously subjected to DNA testing, or the evidence was not subjected to the type of DNA testing that defendant now requests and the requested testing may resolve an issue not resolved by previous testing.

(2) ***Laboratory; Costs.*** If the court orders testing, the court must select an accredited laboratory to conduct the testing. The court may require the defendant to pay the costs of testing.

(3) ***Other Orders.*** The court may enter any other appropriate orders, including orders requiring elimination samples from third parties and designating:

(A) the type of DNA analysis to be used;

(B) the procedures to be followed during the testing; and

(C) the preservation of some of the sample for replicating the testing.

(e) Test Results.

(1) ***Earlier Testing.*** If the State or defense counsel has previously subjected evidence to DNA testing, the court may order the party to provide all other parties and the court with access to the laboratory reports prepared in connection with that testing, including underlying data and laboratory notes.

(2) ***Testing Under this Rule.*** If the court orders DNA testing under this rule, the court must order the production to all parties of any laboratory reports prepared in connection with the testing and may order the production of any underlying data and laboratory notes.

(f) Preservation of Evidence. If a defendant files a petition for post-conviction DNA testing, the court must order the State to preserve during the pendency of the proceeding all evidence in the State's possession or control that could be subjected to DNA testing. The State must prepare an inventory of the evidence and submit a copy of the inventory to the defendant and the court. If evidence is destroyed after the court orders its preservation, the court may impose appropriate sanctions.

(g) Unfavorable Test Results. If the results of the post-conviction DNA testing are not favorable to the defendant, the court must dismiss without a hearing any DNA-related claims asserted under Rule 32.1. The court may make further orders as it deems appropriate, including orders:

- (1) notifying the Board of Executive Clemency or a probation department;
- (2) requesting to add the defendant's sample to the federal combined DNA index system offender database; or
- (3) notifying the victim or the victim's family.

(h) Favorable Test Results. Notwithstanding any other provision of law that would bar a hearing as untimely, the court must order a hearing and make any further orders that are required by statute or the Arizona Rules of Criminal Procedure if the results of the post-conviction DNA testing are favorable to the defendant. If there are no material issues of fact, the hearing need not be an evidentiary hearing, but the court must give the parties an opportunity to argue why the defendant should or should not be entitled to relief under Rule 32.1 as a matter of law. If requested, a victim must be given notice of this hearing.

Rule 32.18. Stay of Execution of a Death Sentence on a Successive Petition

If a defendant has been sentenced to death and the Supreme Court has fixed the time for executing the sentence, the superior court may not grant a stay of execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and the application must show with particularity any claims that are not precluded under Rule 32.2. If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

Rules 32.19. Review of an Intellectual Disability Determination in Capital Cases

No later than 10 days after the trial court makes a finding on intellectual disability in a capital case, the State or the defendant may file with the Court of Appeals a petition for special action challenging the finding. The Rules of Procedure for Special Actions govern the special action, except the Court of Appeals must accept jurisdiction and decide any issue raised.

Rule 32.20. Extensions of Time in a Capital Case; Victim Notice and Service

(a) Notice to the Victim. If the victim in a capital case has filed a notice of appearance under A.R.S. § 13-4234.01, a party requesting an extension of time to file a brief must serve or otherwise provide notice of the request to the victim.

(b) Manner and Timing of Service or Notice.

- (1) *Victim's Choice of the Manner of Service.*** The victim may specify in the notice of appearance whether service of the request should be to the victim or whether it should go to another person, including the prosecutor, and whether service of the notice should be electronic, by telephone, or by regular mail. Service must be made in the manner specified in the victim's notice of appearance or, if no manner is specified, by regular mail. If the victim has requested direct notification, the party requesting an extension of time must serve the victim with notice no later than 24 hours after filing the request.
- (2) *Service Through the Prosecutor.*** If the victim has not specified a method of service or if the victim has requested service through the prosecutor, the party requesting the extension of time must serve the prosecutor's office handling the post-conviction proceeding. If the prosecutor has the duty to notify the victim on behalf of the defendant, the prosecutor must do so no later than 24 hours after receiving the request.

(c) Victim's Response. A victim may file a response to the request no later than 10 days after it is served.

(d) Factors. In ruling on any request for an extension of time to file a brief, the court must consider the rights of the defendant and the victim to a prompt and final conclusion of the case.

Rule 33. Post-Conviction Relief for Defendants Who Pled Guilty or No Contest, Who Admitted a Probation Violation, or Who Had an Automatic Probation Violation

Rule 33.1. Scope of Remedy

Generally. A defendant may file a notice requesting post-conviction relief under this rule if the defendant pled guilty or no contest to a criminal offense, admitted a probation violation, or had an automatic probation violation based on a plea of guilty or no contest.

To challenge the effectiveness of counsel in the first post-conviction proceeding, a defendant may file a second notice requesting post-conviction relief under this rule.

No Filing Fee. There is no fee for filing a notice of post-conviction relief.

Grounds for Relief. Grounds for relief are:

- (a) the defendant's plea or admission to a probation violation was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence as imposed is not authorized by law or by the plea agreement;
- (d) the defendant continues to be or will continue to be in custody after his or her sentence expired;
- (e) newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:
 - (1) the facts were discovered after sentencing;
 - (2) the defendant exercised due diligence in discovering these facts; and
 - (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence.
- (f) the failure to timely file a notice of post-conviction relief was not the defendant's fault;

- (g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence; or
- (h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.

COMMENT

Rule 33. 1(a). This provision encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the United States or Arizona constitutions.

Rule 33.1(d). This provision is intended to include claims such as miscalculation of sentence or computation of sentence credits that result in the defendant remaining in custody when he or she should be free. It is not intended to include challenges to the conditions of imprisonment or correctional practices.

Rule 33.1(h). This claim is independent of a claim under Rule 33.1(e) concerning newly discovered evidence. A defendant who establishes a claim of newly discovered evidence need not comply with the requirements of Rule 33.1(h).

Rule 33.2. Preclusion of Remedy

(i) **Preclusion.** A defendant is precluded from relief under Rule 33.1(a) based on any ground:

- (1) waived by pleading guilty or no contest to the offense;
- (2) finally adjudicated on the merits in any previous post-conviction proceeding;
- (3) waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(j) **Claims Not Precluded.**

- (1) **Generally.** Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a)(3). However, when a defendant raises a claim that falls under Rule 33.1(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons

for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

- (2) ***Ineffective Assistance of Post-Conviction Counsel.*** A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding.

COMMENT TO RULE 33.2(a)(1)

A pleading defendant waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the acceptance or validity of the plea or to the sentence. This provision is not intended to expand or contract what is waived by the entry of a plea under current case law.

Rule 33.3. Nature of a Post-Conviction Proceeding and Relation to Other Remedies

- (a) **Generally.** A post-conviction proceeding is part of the original criminal action and is not a separate action. It replaces and incorporates all trial court post-plea remedies except those obtainable by Rule 24 motions and habeas corpus.
- (b) **Other Applications or Requests for Relief.** If a court receives any type of application or request for relief—however titled—that challenges the validity of the defendant’s plea or admission of a probation violation, or a sentence following entry of a plea or admission of a probation violation, it must treat the application as a petition for post-conviction relief. If that court is not the court that sentenced the defendant, it must transfer the application or request for relief to the court where the defendant was sentenced.

COMMENT

This rule provides that all Rule 33 proceedings are to be treated as criminal actions. The characterization of the proceeding as criminal assures compensation for appointed counsel, and the applicability of criminal standards for admissibility of evidence at an evidentiary hearing, except as otherwise provided.

Rule 33 does not restrict the scope of the writ of habeas corpus under Ariz. Const.

art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals who are unlawfully committed, detained, confined or restrained. But if a convicted defendant files a petition for a writ of habeas corpus (or an application with a different title) that seeks relief available under Rule 33, the petition or application will be treated as a petition for post-conviction relief.

This rule does not limit remedies that are available under Rule 24.

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

(a) Generally. A defendant starts a Rule 33 proceeding by filing a Notice Requesting Post-Conviction Relief.

(b) Notice Requesting Post-Conviction Relief.

- (1) *Where to File; Forms.*** The defendant must file a notice requesting post-conviction relief under Rule 33 in the court where the defendant was sentenced. The court must make “notice” forms available for defendants.
- (2) *Content of the Notice.*** The notice must contain the caption of the original criminal case or cases to which it pertains, and all information shown in Rule 41, Form 24(b).
- (3) *Time for Filing.***
 - (A) *Claims Under Rule 33.1(a).*** A defendant must file the notice for a claim under Rule 33.1(a) within 90 days after the oral pronouncement of sentence.
 - (B) *Claims Under Rules 33.1(b) through (h).*** A defendant must file the notice for a claim under Rules 33.1(b) through (h) within a reasonable time after discovering the basis for the claim.
 - (C) *Successive Notice for Claims of Ineffective Assistance of Rule 33 counsel.*** A defendant may raise a claim of ineffective assistance of Rule 33 counsel in a successive Rule 33 proceeding if the defendant files a notice no later than 30 days after the trial court’s final order in the first post-conviction proceeding, or, if the defendant seeks appellate review of that order, no later than 30 days after the appellate court issues its mandate in that proceeding.
 - (D) *Excusing an Untimely Notice.*** The court must excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a notice was not the defendant’s fault.

(4) *Duty of the Clerk upon Receiving a Notice.*

(A) *Superior court.* Upon receiving a notice, the superior court clerk must file it in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defendant's counsel, the prosecuting attorney's office, and the Attorney General. The clerk must note in the record the date and manner of sending copies of the notice.

(B) *Justice or Municipal Court.* If the conviction occurred in a limited jurisdiction court, upon receiving a notice from a defendant, the limited jurisdiction court clerk must send a copy of the notice to the prosecuting attorney who represented the State, and to defendant's counsel or the defendant, if self-represented. The clerk must note in the record the date and manner of sending copies of the notice.

(5) *Duty of the State upon Receiving a Notice.* Upon receiving a copy of a notice, the State must notify any victim who has requested notification of post-conviction proceedings.

COMMENT TO RULE 33.4(a)

A Notice Requesting Post-Conviction Relief informs the trial court of a possible need to appoint an attorney for the defendant as provided in Rule 33.5(a). The Notice Requesting Post-Conviction Relief also assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

Rule 33.5. Appointment of Counsel

(a) Generally. No later than 15 days after the defendant has filed a timely first notice under Rule 33.4, or a notice under Rule 33.4(b)(3)(C), the presiding judge must appoint counsel for the defendant if:

- (1)** the defendant requests it;
- (2)** the defendant is entitled to appointed counsel under Rule 6.1(b); and
- (3)** there has been a previous determination that the defendant is indigent, or the defendant has completed a declaration of indigency and the court finds that the defendant is indigent.

Upon filing of all other Rule 33 notices, the presiding judge or the judge's designee may appoint counsel for an indigent defendant.

(b) Appointment of Investigators, Expert Witnesses, and Mitigation Specialists. On application and if the trial court finds that such assistance is reasonably necessary for

an indigent defendant, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7.

- (c) Attorney-Client Privilege and Confidentiality for the Defendant.** The defendant's prior counsel must share all files and other communications with post-conviction counsel. This sharing of information does not waive the attorney-client privilege or confidentiality claims.

Rule 33.6. Duty of Counsel; Self-Represented Defendant's Petition; Waiver of Attorney-Client Privilege

- (a) Generally.** In a Rule 33 proceeding, counsel must investigate the defendant's case for any colorable claims.

(b) Discovery.

- (1) *After Filing a Notice.*** After the filing of a notice but before the filing of a petition, and upon a showing of substantial need for material or information to prepare the defendant's case, the court may enter an order allowing discovery. To show substantial need, the defendant must demonstrate that the defendant cannot obtain the substantial equivalent by other means without undue hardship.
- (2) *After Filing a Petition.*** After the filing of a petition, the court may allow discovery for good cause. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim.

- (c) Counsel's Notice of No Colorable Claims.** If counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination, and promptly provide a copy of the notice to the defendant. The notice must include or list:

- (1)** a summary of the facts and procedural history of the case;
- (2)** the specific materials that counsel reviewed;
- (3)** the date counsel provided the record to the defendant, and the contents of that record;
- (4)** the dates counsel discussed the case with the defendant;
- (5)** the charges and allegations presented in the complaint, information, or indictment;

In the notice, counsel should also identify the following:

- (6) that the plea agreement contains the correct classification of offenses and the correct sentencing range of each offense;
- (7) any potential errors related to the entry of the plea for which there were no objections, but which might rise to the level of fundamental error;
- (8) any determination of the defendant's competency that was raised prior to sentencing;
- (9) any objections raised at the time of sentencing;
- (10) the court's determination of the classification and category of offenses for which the defendant was sentenced under the plea agreement;
- (11) any aggravating factors are supported by the record;
- (12) the court considered any mitigation evidence that was offered;
- (13) the court's determination of pre-sentence incarceration credit;
- (14) the sentence imposed by the court;
- (15) if a sentence above the presumptive term was imposed, the court relied on at least one proven statutory aggravating factor; and
- (16) any potential claims of ineffective assistance of counsel.

A notice of no colorable claims must also include or incorporate Form 25(b), with citations to the pertinent portions of the record.

- (d) Self-Represented Defendant's Petition.** Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.
- (e) Counsel's Duties After Filing a Notice Under Section (c).** After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the post-conviction proceeding.
- (f) Attorney-Client Privilege.** By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

COMMENT TO RULE 33.6(b)

The standard in this rule for pre-petition discovery is derived from Rule 15.1(g).

COMMENT TO RULE 33.6(c)

Rule 33.6(c) is intended to assist counsel in reviewing the record to ensure that substantial justice is done. Failure to complete Form 25(b), or identify any issues listed in Rules 33.6(c) does not constitute a *per se* deviation from prevailing professional norms to the extent a pleading defendant possesses a right to effective post-conviction counsel under Arizona law. Counsel must take care that the Notice of No Colorable Claims does not reveal client confidences to the court without the client's informed consent. See Ariz. Rules Sup. Ct. 42, ER 1.6.

Rule 33.7. Petition for Post-Conviction Relief

(a) Deadlines for Filing a Petition for Post-Conviction Relief.

- (1) ***Defendant with Counsel.*** Appointed counsel must file a petition no later than 60 days after the date of appointment.
- (2) ***Self-Represented Defendant.*** A self-represented defendant must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.
- (3) ***Time Extensions.*** For good cause and after considering the rights of the victim, the court may grant a defendant a 30-day extension to file the petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.

(b) **Form of Petition.** A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.

(c) **Length of Petition.** The petition must not exceed 28 pages.

(d) **Declaration.** A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge or belief.

(e) **Attachments.** The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.

(f) **Effects of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the

petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

Rule 33.8. Transcription Preparation

- (a) Request for Transcripts.** If the verbal record of trial court proceedings was not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.
- (b) Orders Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant has specified in the notice.
- (c) Deadlines.** The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.
- (d) Cost.** If the defendant is indigent, the transcripts must be prepared at county expense.
- (e) Unavailability of Transcripts.** If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

- (1) Deadlines.** The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.
- (2) Contents.** The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

- (b) Defendant's Reply.** The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.
- (c) Length of Response and Reply.** The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.
- (d) Amending the Petition.** After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 33.10. Assignment of a Judge

- (a) Generally.** The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. The provisions of Rules 10.1 and 10.2 apply in proceedings for post-conviction relief when the case is assigned to a new judge.
- (b) Dispute Regarding Public Records.** The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, that concerns access to public records requested for a post-conviction proceeding.

Rule 33.11. Court Review of the Petition, Response, and Reply; Further Proceedings

- (a) Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.
- (b) Setting a Hearing.** If the court does not summarily dismiss the petition, it must set a status conference or a hearing within 30 days.
- (c) Notice to the Victim.** If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.
- (d) Defendant's Competence.** The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim.

Rule 33.12. Informal Conference

- (a) Generally.** At any time, the court may hold an informal conference to expedite a proceeding for post-conviction relief.

- (b) **The Defendant's Presence.** The defendant need not be present at an informal conference if defense counsel is present.

Rule 33.13. Evidentiary Hearing

- (a) **Generally.** The defendant is entitled to a hearing to determine issues of material fact and has the right to be present and to subpoena witnesses for the hearing. The court may order the hearing to be held at the defendant's place of confinement if facilities are available and after giving at least 15 days' notice to the officer in charge of the confinement facility. In superior court proceedings, the court must make a verbatim record.
- (b) **Evidence.** The Arizona Rules of Evidence applicable to criminal proceedings apply at the hearing, except that the defendant may be called to testify.
- (c) **Burden of Proof.** The defendant has the burden of proving factual allegations by a preponderance of the evidence. If the defendant proves a constitutional violation, the State has the burden of proving beyond a reasonable doubt that the violation was harmless.
- (d) **Decision.**
- (1) ***Findings and Conclusions.*** The court must make specific findings of fact and expressly state its conclusions of law relating to each issue presented.
 - (2) ***Decision in the Defendant's Favor.*** If the court finds in the defendant's favor, it must enter appropriate orders concerning:
 - (A) the conviction, sentence, or detention;
 - (B) any further proceedings, including setting the matter for trial and conditions of release; and
 - (C) other matters that may be necessary and proper.
- (e) **Transcript.** On a party's request, the court must order the preparation of a certified transcript of the evidentiary hearing. The request must be made within the time allowed for filing a petition for review. If the defendant is indigent, preparation of the evidentiary hearing transcript will be at county expense.

Rule 33.14. Motion for Rehearing

- (a) **Timing and Content.** No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

- (b) **Response and Reply.** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply no later than 10 days after the response is served.
- (c) **Stay.** The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court.
- (d) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 33.16.
- (e) **Disposition if Motion Granted.** If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing and then either amend or reaffirm its previous ruling. The court must state its reasons for amending a previous ruling. The State must notify the victim of any action taken by the court if the victim has requested notification.

Rule 33.15. Notification to the Appellate Court

If a petition for review of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must file any final ruling in the appellate court within 10 days after the ruling is filed.

Rule 33.16. Petition and Cross-Petition for Review

(a) Time and Place for Filing.

- (1) ***Petition.*** No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, or the dismissal of a notice, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) ***Cross-Petition.*** The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.
- (3) ***Place for Filing.*** The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.
- (4) ***Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.***

(A) A party may seek an extension of time for filing the petition or cross-petition for review by filing a motion with the trial court, which must decide the motion promptly.

(B) If the time for filing the petition or cross-petition for review has expired, the party may request the trial court's permission to file a delayed petition or cross-petition for review. If the court grants the request to file a delayed petition or cross-petition for review, the court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or cross-petitioner must file with the trial court a "notice of filing." The notice of filing may designate additional items for the record described in section (i). These items may include additional certified transcripts of trial court proceedings prepared under Rule 33.13(e), or that were otherwise available to the trial court and the parties and are material to the issues raised in the petition or cross-petition for review.

(c) Form and Contents of a Petition or Cross-Petition for Review.

(1) ***Form and Length.*** Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

(2) ***Contents.*** A petition or cross-petition for review must contain:

(A) copies of the trial court's rulings entered under Rules 33.2, 33.11, 33.13, and 33.14;

(B) a statement of issues the trial court decided that the defendant is presenting for appellate review;

(C) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and

(D) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

(3) ***Effect of a Motion Rehearing.*** The filing of a motion for rehearing under Rule 33.14 does not limit the issues a party may raise in a petition or cross-petition for review.

(4) ***Waiver.*** A party's failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue.

(d) Appendix Accompanying a Petition or Cross-Petition. Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

(e) Service of a Petition for Review, Cross-Petition for Review, Reply, or Related Filing. A party filing a petition, cross-petition, appendix, response, or reply, or another filing, must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with Rule 1.7(c)(3), identifying who was served and the date and manner of service.

(f) Response to a Petition or Cross-Petition for Review; Reply.

(1) *Time and Place for Filing a Response; Extensions of Time.*

(A) No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate court. Rule 31.3(d) governs computation of the deadline for filing the response.

(B) A party may file a motion with the appellate court for an extension of the time to file a response or reply in accordance with Rule 31.3(e).

(2) *Form and Length of Response.* The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in subpart (c)(1). An appendix to a response must comply with the form and substantive requirements in section (d).

(3) *Reply.* No later than 10 days after a response is served, a party may file a reply. The reply is limited to matters addressed in the response and may not exceed 3,000 words if typed and 11 pages if handwritten. It also must comply with the requirements in subpart (c)(1) and may not include an appendix.

- (g) Computing and Modifying Appellate Court Deadlines.** Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule.
- (h) Amicus Curiae.** Rules 31.13(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.
- (i) Stay Pending Appellate Review.** The State's filing of a petition for review of an order granting a new trial automatically stays the order until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court.
- (j) Transmitting the Record to the Appellate Court.** No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record to the appellate court. The record includes copies of the notice requesting post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responses, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).
- (k) Disposition.** The appellate court may grant review of the petition or cross-petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper.
- (l) Reconsideration or Review of an Appellate Court Decision.** The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).
- (m) Return of the Record.** After the disposition of the petition for review, the appellate clerk must return the record to the trial court clerk.
- (n) Notice to the Victim.** Upon the victim's request, the State must notify the victim of any action taken by the appellate court.

Rule 33.17. Post-Conviction Deoxyribonucleic Acid Testing

- (a) Generally.** Any person who has been convicted and sentenced for a felony offense may petition the court at any time for forensic deoxyribonucleic acid (DNA) testing of any evidence:
- (1)** in the possession or control of the court or the State;

- (2) related to the investigation or prosecution that resulted in the judgment of conviction; and
- (3) that may contain biological evidence.

(b) Manner of Filing; Response. The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 33.4(b)(4). The State must respond to the petition no later than 45 days after it is served.

(c) Appointment of Counsel. The court may appoint counsel for an indigent defendant at any time during proceedings under this rule.

(d) Court Orders.

- (1) ***DNA Testing.*** After considering the petition and the State's response, the court must order DNA testing if the court finds that:
 - (A) a reasonable probability exists that the defendant would not have been prosecuted, or the defendant's sentence would have been more favorable, if DNA testing would produce exculpatory evidence;
 - (B) the evidence is still in existence; and
 - (C) the evidence was not previously subjected to DNA testing, or the evidence was not subjected to the type of DNA testing that defendant now requests and the requested testing may resolve an issue not resolved by previous testing.
- (2) ***Laboratory; Costs.*** If the court orders testing, the court must select an accredited laboratory to conduct the testing. The court may require the defendant to pay the costs of testing.
- (3) ***Other Orders.*** The court may enter any other appropriate orders, including orders requiring elimination samples from third parties and designating:
 - (A) the type of DNA analysis to be used;
 - (B) the procedures to be followed during the testing; and
 - (C) the preservation of some of the sample for replicating the testing.

(e) Test Results.

- (1) ***Earlier Testing.*** If the State or defense counsel has previously subjected evidence to DNA testing, the court may order the party to provide all other

parties and the court with access to the laboratory reports prepared in connection with that testing, including underlying data and laboratory notes.

(2) ***Testing Under this Rule.*** If the court orders DNA testing under this rule, the court must order the production to all parties of any laboratory reports prepared in connection with the testing and may order the production of any underlying data and laboratory notes.

(f) **Preservation of Evidence.** If a defendant files a petition for post-conviction DNA testing, the court must order the State to preserve during the pendency of the proceeding all evidence in the State's possession or control that could be subjected to DNA testing. The State must prepare an inventory of the evidence and submit a copy of the inventory to the defendant and the court. If evidence is destroyed after the court orders its preservation, the court may impose appropriate sanctions.

(g) **Unfavorable Test Results.** If the results of the post-conviction DNA testing are not favorable to the defendant, the court must dismiss without a hearing any DNA-related claims asserted under Rule 33.1. The court may make further orders as it deems appropriate, including orders:

- (1) notifying the Board of Executive Clemency or a probation department;
- (2) requesting to add the defendant's sample to the federal combined DNA index system offender database; or
- (3) notifying the victim or the victim's family.

(h) **Favorable Test Results.** Notwithstanding any other provision of law that would bar a hearing as untimely, the court must order a hearing and make any further orders that are required by statute or the Arizona Rules of Criminal Procedure if the results of the post-conviction DNA testing are favorable to the defendant. If there are no material issues of fact, the hearing need not be an evidentiary hearing, but the court must give the parties an opportunity to argue why the defendant should or should not be entitled to relief under Rule 33.1 as a matter of law. If requested, a victim must be given notice of this hearing.